MANASSEH v. THE ATTORNEY-GENERAL AND MUSTAPHA BIN AHMAD .... THIRD PARTY.

[Orig. Civ. Juris. (Jobling, J.) October 20, 1949]

[Penang — Crown Suit No. 1 of 1949]

Negligence — General and special damages against a servant of the Crown — Quantum of damages.

In this case the plaintiff's claim was for general and special damages in respect of injuries alleged to have been caused by the negligence of a servant of the Crown. The defendant denied the allegation and claimed that the injuries were caused by the negligent act of the third party.

The plaintiff's (a student) case was that on 16th April, 1948 at about 11 a.m. he was proceeding on his bicycle at about 5 or 6 m.p.h. along Kelawei Road towards Bagan Jermal on his proper side and close to the curb when he was knocked down by a Police Constable on a motor cycle who came at considerable speed from the opposite direction. He lost consciousness and did not regain it until he was in hospital. His principal injuries were a broken wrist and a broken leg. He remained in hospital until 22nd May, 1948 and after discharge visited it periodically for treatment until 13th November, 1948.

Held, on the evidence that the cause of the injury to the plaintiff was **firstly**, the negligent act of Police Constable 7789 in rounding a bend in the road at a speed which deprived him of proper control of his vehicle and **secondly**, the negligent act of the Third Party in driving his motor car partly on the wrong side of the road at a bend therein.

CROWN SUIT.

T. E. Conaghan for the Plaintiff.

C. Wylie (Federal Counsel) for the Defendant.

F. G. Pooley for the Third Party.

Jobling, J. : — After giving the facts as stated in the Head Notes and reviewing the evidence his Lordship concluded: "I find therefore that the cause of the injury to the Plaintiff was *first*, the negligent act of P.C. 7789 in rounding a bend in the road at a speed which deprived him of proper control of his vehicle and *secondly*, the negligent act of the Third Party in driving his motor car partly on the wrong side of the road at a bend therein. I find that it was the coincidence of these two negligent acts that resulted in injury to the Plaintiff and that both the Defendant and the Third Party are equally responsible for it.

"The special damages incurred have been agreed at $1,312.00 and there is only the question of general damages to be decided.

"The Plaintiff suffered a fracture of the right leg and wrist and it was not until 1st October, 1948, a period of 5½ months, that he was able to resume his studies at school. He has suffered considerable pain and discomfort over a long period and that pain has not yet entirely disappeared. The medical evidence shows that Plaintiff has completely recovered except for occasional pain and a slight limitation of the dorsiflection of the right foot and that the former will disappear but the latter will probably be permanent.

"The grounds for general damages are, therefore, the pain and discomfort suffered, the loss of 5½ months schooling and the slight permanent disability. After consideration of these matters and taking into account Plaintiff's youth and circumstances I award $1,250.00 as general damages.

"Judgment will, therefore, be entered for the Plaintiff for $1,312.00 special damages and $1,250.00 general damages and costs against the Defendant and for the Defendant against the Third Party of half those general and special damages and half those costs with half such costs as are attributable to the Third Party proceedings."

Judgment Accordingly.

PUBLIC PROSECUTOR v. SOH TUAN CHEUNG & 2 ORS.

[App. Cr. Juris. (Taylor, J.) September 30, 1949]

[K.L. — Cr. App. from Sessions Court No. 32 of 1949]

Customs Enactment, 1936 — Joint possession of a quantity of uncustomed goods.

In this case the three accused were charged with knowingly being in possession of a commercial quantity of uncustomed cigarettes which were found in a lorry driven by the second accused, the other two being also in the lorry. Evidence of a statement made by one of them to a Customs Officer was tendered by the prosecution but rejected by the learned President of the Sessions Court. At the close of the case for the prosecution all three accused were acquitted on the ground that they were not proved to have been in possession.

The Public Prosecutor appealed on the grounds:— (a) that the evidence mentioned was wrongly rejected; (b) that there was evidence of possession which, if unrebutted, would have warranted a conviction.

Held, that it is no doubt correct that when the evidence points to only one of the several accused being guilty and the circumstances do not implicate one rather than another the Court will be left in doubt and therefore should acquit them all (even though convinced that one or other of them must be guilty), but when, the evidence points to a joint enterprise the Court ought to consider whether a **prima facie** case of joint possession is made out and if so should call on the accused for their defence. It is still open to the accused to shew that the possession was not joint.

CRIMINAL APPEAL.

H. Shepherd (D. P. P.) for the Appellant.

R. H. V. Rintoul for the First Respondent.

Second and Third Respondents in person.

Cur. Adv. Vult.

Taylor, J. : — In this case the three accused were charged with knowingly being in possession of a commercial quantity of uncustomed cigarettes which were found in a lorry driven by the second accused, the other two being also in the lorry.

Evidence of a statement made by one of them to a Customs officer was tendered by the prosecution but rejected by the learned President of the Sessions Court. At the close of the case for the prosecution all three accused were acquitted on the ground that they were not proved to have been in possession.

The Public Prosecutor appealed on the grounds :—

(a) that the evidence mentioned was wrongly rejected;

(b) that there was evidence of possession which, if unrebutted, would have warranted a conviction.

The reason why evidence of the statement was rejected was that no caution was shewn to have been administered to the accused by the Customs officer before he asked them certain questions. The President referred to Emergency Regulation 33 and held that "by analogy" a warning is required under the Customs Enactment. It was also said that there is a rule of practice that all such questions are to be preceded by a warning.

I cannot accept these arguments. We do not legislate by analogy. The Emergency Regulation specifies clearly the offences to which it applies and those do not include customs offences.

Evidence at this trial ought therefore to have been governed by the ordinary law alone.

No evidence was given, either at the trial or before me, as to the alleged rule of practice and I have never previously heard of it. No circular or written instruction of any kind was produced.

Assuming that something of the kind exists it cannot, unless it is a statutory rule, in any way modify the law. A caution of the type prescribed in the Emergency Regulations would manifestly conflict with Section 126 of the Customs Enactment.

I do not decide affirmatively that the evidence in question was admissible because I do not know its nature. It may have been a mere statement or it may have been a confession. If it was in fact a confession, the provisions of the Evidence Enactment apply to it. I decide only that it was *prima facie* admissible and that the reasons given for rejecting it were unsound.

On the issue of possession, the President rightly overruled an attempt to apply the definition of "possession" in the Chandu Enactment but he went on to say ".....the goods were not proved to be in the possession of any one of the accused."

This was not the true issue.

The three accused were charged jointly with joint possession.

The evidence raised an inference that they were acting in concert.

It is no doubt correct that where the evidence points to only one of several accused being guilty and the circumstances do not implicate one rather than another the Court will be left in doubt and therefore acquit them all (even though convinced that one or other of them must be guilty), but where, as here, the evidence points to a joint enterprise the Court ought to consider whether a *prima facie* case of joint possession is made out and if so call on the accused for their defence. It is still open to them to shew that the possession was not joint. In my view the learned President in this case misdirected himself on the law and did not weigh the evidence in correct relation to the charge; nor did he sufficiently analyse the case.

This Court will not grant a new trial, merely because misdirection is shewn; it is a matter of discretion, having regard to all the circumstances. In this case, considering the quantity of goods involved I award a new trial as against the first and third respondents.

The second accused appeared to be an independent driver and the cigarettes were wrapped in plain paper and mixed with innocent goods. In my view the case against him was weaker than that against the other two accused and as a matter of discretion I did not consider it necessary that he should stand a second trial.

Appeal dismissed against 2nd respondent. New trial ordered against 1st and 3rd respondents.

CHONG CHIN YUAN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Callow, J.) September 15, 1949]

[K.L. — Cr. App. from Sessions Court No. 40 of 1949]

Customs Enactment, 1936, Ss. 114 and 126 — Statement made to Customs Officer — Whether Customs Officer is a Police Officer — Statement interpreted by witness for prosecution.

This was an appeal from the Sessions Court, Kuala Lumpur, against the conviction and sentence of the